APPEAL NO. 93033

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On December 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent, claimant herein, injured her back in the course of her employment when she lifted a heavy patient from a wheelchair to a toilet and back again. She also found that notice was timely because the claimant had good cause to delay notice until the time it was given. Respondent, carrier herein, asserts that the hearing officer erred in refusing to expand the issues to be decided at the hearing, in granting less discovery than requested, and in refusing to consolidate this case with another pending by claimant. Carrier also asserts that certain findings of fact and conclusions of law are based on no or insufficient evidence. Claimant replies that she supports the decision of the hearing officer.

DECISION

Finding that the decision is supported by sufficient evidence, we affirm.

Claimant worked as a nurse's aide. At the time of the alleged injury, she stated that she worked for three services that sent her into individual patient's homes or rooms to assist in their care. On (date of injury), claimant testified that while working for (SHHC) she went to the home of FM, an elderly female stroke victim who weighed over 200 pounds. In attempting to assist FM from her wheelchair to a toilet, claimant could not support the weight and perceived FM slipping to the floor. Claimant said that she went down to the floor with FM. As she was overcome by the patient's weight, claimant testified that she felt a sharp pain in her lower back. She later testified that it was an excruciating pain but she would not let herself drop the patient. The pain passed; later she felt it down her leg, and that night she had to lie on the floor because her back hurt with such a "sharp, pressure" pain. The sharp pain did not last and she continued to work during the ensuing months. As time passed, she thought that she was overworking herself, that she just had "aches and pains" and reduced her work in March, 1992. She went to the hospital emergency room on April 7, 1992 complaining of numbness in her lower extremities and bladder difficulty. She was "admitted to Neurology" on April 9, 1992. After several days of testing, she underwent back surgery, a left discectomy at L5-S1, on April 16, 1992. The discharge summary stated that her bladder dysfunction was secondary to the disc herniation.

Despite the testimony given above, claimant had previously indicated doubt as to who was responsible in regard to her injury. She filed a claim indicating that she injured her back on another date while working for another employer. Hospital records indicate that she gave different dates as to when she was hurt. She acknowledged that she was in a car accident in 1983 and that prior medical care had caused some problems of a different nature in her back. In regard to these points, the evidence indicated the following:

1.who was responsible--Claimant gave a written statement dated May 27, 1992, in

which she said, "I don't know whether you know (SHHC) is responsible because I hurt myself there whether everybody is responsible because I was working for the people."

At the hearing, claimant testified similarly that she thought she was supposed to file a claim against everyone she worked for. She said she did not know who was responsible and asked whether she was supposed to file on everyone she worked for just because she was working for them, whether they were responsible even though she did no lifting for them.

2.another date--At the hearing, claimant was asked how she knew the later time (possibly against another employer) was not when she hurt her back. She stated that she knew at the later time that she had already hurt it in September 1991 while working for SHHC. Her testimony was consistent at the hearing that she hurt her back on (date of injury), but aggravated it several times later.

3.different dates--Claimant testified that when she gave a history she did not refer to June and August as written in her chart regarding injury, but stated that a medical student took the history and did not record it at the time she gave it.

4.car accident--Claimant testified that any prior problems she had with her back were in a different, higher area of the back.

In addition, claimant's exhibit 1 provided some evidence that could be considered by the hearing officer to be corroborative of her incident on (date of injury). That exhibit is a Home Health Aide Activity Report which shows that on (date of injury) claimant attended FM; under "comments" is written, "[p]roblems with transfers (wheelchair-potty chair, potty chair-wheelchair). Grandson came in to help both times." Claimant also stated that she then called her supervisor, (DU), primarily to tell her of the problem with the patient, but also said that she had had a problem with her back in trying to hold the patient but thought her back was all right. In her statement DU "can't recall" being told of a back problem by claimant.

Claimant also testified that she felt pressure in her pelvis at Thanksgiving. She saw no doctor before April 1992 because she had to work and thought she was just overworking herself. She added that the pain came and went; if it had been continuous, she would have gone to a doctor earlier. She says she was very stressed in the months before her hospitalization, and she realizes now that her actions were more clumsy or less responsive as she approached the time of her hospitalization, but she thought then that it was not a permanent thing.

A prehearing conference was held on September 8, 1992. At this conference the hearing officer considered carrier's discovery requests and whether to consolidate the hearings on claimant's claims. (Prior to this date, the hearing officer had denied the carrier's request to add an issue as to whether prior and subsequent injuries contributed to or were the sole cause of claimant's problem; by order dated August 28, 1992, the hearing officer stated that the proposed issue was contained within the issue of whether claimant was injured in the course and scope of employment.) The record of the September prehearing conference indicates that certain material had been exchanged previously, that the hearing officer questioned the claimant and carrier extensively about the basis for added discovery, and that the hearing officer concluded that some additional discovery was warranted. She ordered claimant to make available to carrier her work log covering the period September 1, 1991 to October 31, 1991 and her W-2 statements for 1991. She cautioned both parties that neither could enter evidence at the hearing that had not been exchanged within the rules of the Commission. She did not grant the carrier's request that subpoenas be issued for employment documents from June 1991 through April 1992, but did issue subpoenas to claimant's employers for records during the September 1, 1991 through October 31, 1991 time period. The hearing officer denied the request to consolidate hearings of claimant's claims of injury on separate dates.

The hearing officer did not err in refusing to expand the issues beyond those set forth at the benefit review conference, which included an issue of injury in the course of employment and one of timely notice. Article 8308-6.31 of the 1989 Act provides that an issue not raised at the benefit review conference may not be raised without the consent of the parties or without a determination of good cause as to why the issue was not raised at the benefit review conference. In addition, sole cause is an affirmative defense which, if proved by the carrier, will defeat a claimant's attempt to show that the injury occurred in the course and scope of employment. *See* T.E.I.A. v. Page, 553 S.W.2d 98 (Tex. 1977) and Home Ins. Co. v. Gillum, 680 S.W.2d 844 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.). While these cases, decided under the prior workers' compensation law, also referred to pleading the issue, the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 91123, dated February 7, 1992, has said that pleadings, as such, are not required by the 1989 Act. The hearing officer's statement that sole cause was subsumed within the pending issue was not error and clearly allowed the carrier to make its case identifying a sole cause, other than the injury of (date of injury). Contribution, however, as allowed by in Article 8308-4.30 of the 1989 Act, would have no effect until such time as issues of impairment and supplemental income benefits arise, so that portion of the proposed issue would have no effect on the outcome of this hearing on the compensability of the injury. The evidence of sole cause does not require us to conclude that the hearing officer's findings and conclusions of injury in the course and scope of employment were against the great weight and preponderance of the evidence.

The standard for review of a hearing officer's decision in a discovery request is

whether she acted arbitrarily. First, the 1989 Act is not generally governed by the Texas Rules of Civil Procedure or by the Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1993). (*See* Article 8308-6.32 of the 1989 Act and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.1 (Rule 142.1).) Rule 142.13 does provide details in regard to requirements for production by either party, but provides only that the hearing officer may grant added discovery upon a showing of good cause. In this instance, the hearing officer expressed a concern for the relevance of the broad time period set forth by the carrier. (June 1991 through April 1992.) When the hearing officer discussed restricting subpoenas to employers to a 60 day time marked by the alleged injury date, no request was made for a similar time period for subpoenas built around claimant's other alleged date of injury against another employer. Even had there been no subpoenas, the carrier could still obtain employment records of claimant from the employer it insured for any period, and Article 8308-4.66(d) of the 1989 Act allows carrier to obtain medical records of the claimant. In this case, the hearing officer's decision to provide subpoenas for the 60 day period encompassing the alleged injury date, to require the claimant to provide her log for the same period, and to require all W-2's for 1991, was not arbitrary and there was no abuse of discretion. *See* Texas Workers' Compensation Commission Appeal No. 92613, dated December 28, 1992.

Neither the 1989 Act nor the rules of the Commission address consolidation of hearings. Alamo Express v. Union City Transfer, 158 Tex 234, 309 S.W.2d 815 (1958) addressed the question by saying, "(a)n administrative agency has the sole discretion to determine whether or not it will consolidate into one hearing applications pending before it involving the same commodities, routes, parties, etc." In the case on appeal, we see no reason why that rationale should not apply, especially in view of no evidence that the hearing officer's action was designed to deprive either party of any rights in refusing to consolidate.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. She could believe claimant hurt her back in the manner described based on her testimony at the hearing (*see* Houston Gen. Ins. Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) even though medical records indicated a reported injury date that was different. *See* T.E.I.A. v. Butler, 483 S.W.2d 530 (Tex. Civ. App.-Houston [14th Dist] 1972, writ ref'd n.r.e.). She could consider that claimant's activity report provided corroboration for an event that could cause injury on (date of injury). She could consider claimant's testimony that she did not think the injury was serious as a basis for good cause to delay reporting the injury. *See* Texas Workers' Compensation Commission Appeal No. 92140, dated May 20, 1992. While claimant had pain from time to time, felt pain in her back, and noticed that she was not able to function in many ways as well as she had prior to (date of injury), claimant is not a doctor and should not be charged with knowing exactly what was wrong with her in this instance when it took doctors in April 1992 several days of testing to decide just what the injury was. *See* Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980). Under the

circumstances, we can not say the determination of the hearing officer was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In Re King's Estate, 244 S.W.2d 660 (Tex. 51).

Conclusions of Law Nos. 5 and 6 appear to be contradictory. One says that claimant timely reported her injury and the other states that she had good cause for failing to report within 30 days. While it is true that a finding of good cause for failing to notify within the statutory time negates the sanction for failure to notify, it would be more appropriate to consider the two as separate as they are treated in Article 8308-5.01 and 5.02. The findings of fact make it clear that the hearing officer found good cause to delay notification until April 7, 1992 and that notice was then given within two weeks thereof. Conclusion of Law No. 5 that the injury was timely reported may be disregarded as unnecessary to the decision.

The carrier also asserts that the decision and order are too vague. Article 8308-4.21 of the 1989 Act provides that income benefits for a compensable injury shall be paid without an order by the Commission. The decision is not too vague.

The evidence sufficiently supports the findings of fact. The evidence and findings of fact sufficiently support the conclusions of law except for conclusion of Law No. 5. The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz

Appeals Judge